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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 783

ORMAN W. EWING, *Petitioner*,

v.

NATIONAL AIRPORT CORPORATION

BRIEF OF NATIONAL AIRPORT CORPORATION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIOARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

NATIONAL AIRPORT CORPORATION,
Defendant.

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Statement

In the statement of the petition, counsel for the petitioner seeks to divide into two parts the services rendered by the petitioner, practically admitting that he did lobbying work for the first Bill which was vetoed by the President but that he had avoided any lobbying in connection with the second Bill which became a law by the President's signature.

It plainly appears in the Transcript of Record (pp. 38-39-40), in Defendant's Exhibit No. 6 (pp. 45-46-47), in

Plaintiff's Exhibit No. 1 (pp. 48-49), in the Re-Cross Examination of Ewing (pp. 50-51-52) and in Plaintiff's Exhibit No. 2 (p. 53) that the work alleged to have been done by the plaintiff was all a part of the same transaction for which he sought compensation in the suit, and that the plaintiff was engaged in lobbying during the entire time.

The statement in the petition (referring to the vetoed Bill), that it cannot be assumed that the jury gave the petitioner $8,750 for activities in getting a Bill passed that produced nothing, can be readily answered by saying that neither can it be assumed that the jury awarded the petitioner this large amount for assisting in getting a Bill through which allowed or rather required the defendant to purchase a road for $25,000, which road was already closed for all practical intents and purposes by Public Resolution No. 75, 74th Congress, shown as Defendant's Exhibit No. 10 (Transcript of Record, pp. 54-55).

Counsel for defendant does not recall any effort to divide the claim into two separate and distinct parts until this case reached the Circuit Court of Appeals for the Fourth Circuit, which court promptly ruled that it was all one transaction. If, however, this is a matter of any importance in connection with the petition of the plaintiff, it clearly appears from the record that the petitioner did objectionable lobbying work in connection with the second Bill as well as the first, as shown on pages 39-40 of the Transcript of Record.

On page 39 he testified that he had contacted practically every member of Congress, that he had used a picture contained in Life Magazine in contacting approximately 500 members of Congress; that he wrote a great many letters to different Congressmen and Senators who had asked him questions and told him to answer by letter. He further testified that on the day he had the final meeting with a representative of the defendant at the Airport, the Camp Springs Bill was before Congress (that being a proposed site for another airport near Washington), and that this

site was recommended by the Airport Commission to appropriate money for building an airport some 10 or 12 miles from Washington. He used the following language in describing his activities:

> "'We' had done a lot of work trying to keep the airport where it was instead of having it go down to Camp Springs; that 'we' helped to prepare it all. 'We' were ready for it when 'we' held it back until the President signed this Bill. By the way, I worked the Senate membership three days to get the President to sign the Bill."

In Defendant's Exhibit No. 6 (p. 49), being a letter written by the plaintiff from Salt Lake City on September 12, 1937 (about the middle of page 46 of the Transcript of Record), plaintiff wrote as follows:

> "I think you are aware that I put myself under deep obligation to King to induce him to get out of the way. That is part of lobbying. You, as a young man, may not realize that almost everything done in Congress is a trade. You despise the whole mess, maybe justly so, but you should not show your contempt. I am obligated to O'Mahoney, Copeland and Burke for assistance rendered. Do you think it quite fair for me, for the sake of a few hundred dollars retainer to desert me and force me to fulfill these obligations on my own?"

Counsel for plaintiff in their petition states that two serious questions are presented:

> (1) Whether the trial court and the court below, with no evidence whatever in the record showing any objectionable activity with regard to the second Bill, can indulge in surmise and go out of its way to set the verdict aside;

(2) Entirely aside from the above, has a Federal Court in a case arising solely by reason of diverse citizenship, the right to impose its own ideas of public policy of the State of Virginia which the Federal Court must apply—at least in the absence of a showing of such gross and unconscionable conduct that no court of justice could entertain the case? Lacking such an overwhelming showing, does the failure of the courts below to follow the Virginia law amount to a violation of this Court's ruling in *Erie R. C. Co.* v. *Tompkins,* 304 U. S. 64?

Reasons for Refusal of Writ

An examination of the Transcript of Record will, we think, answer the *first question* without the slightest shadow of a doubt. Both State and Federal Courts have passed on the question of lobbying contracts in numerous cases, and the following rules or principles have been thoroughly established by the Supreme Court of the United States, by all other Federal Courts, and by a great majority of the State Courts:

1. If the agreement or contract is one to procure by lobbying service, if possible, the passage of legislation, then the contract is void.

2. An agreement, express or implied, for merely professional services, such as drafting a petition to set forth a claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority is valid.

3. The courts will closely scrutinize any contract, express or implied, where a contingent fee is involved in matters pertaining to legislation, as the courts have held repeatedly that when a contingent fee is involved in contracts of this sort, the temptation is great to go

beyond legal limits in order to put through the desired legislation.

4. If any part of the contract requires "lobbying", then the whole contract is void, as the courts will not undertake to separate the good from the bad in contracts of this nature.

The following cases, we submit, are absolutely decisive of the case at bar: *Marshall* v. *Baltimore & Ohio Railroad Company*, 57 U. S. 314 (14 Law Ed. 953); *John W. Burke, Executor of Nicholas P. Trist* v. *Linus M. Child*, 88 U. S. 441 (22 Law Ed. 623); *The Providence Tool Co.* v. *Samuel Norris*, 69 U. S. 45 (17 Law Ed. 869); *George C. Hazelton* v. *Margaret R. Sheckels et als.*, 201 U. S. 71 (50 Law Ed. 939); *Noonan* v. *Gilbert*, 68 Fed. Rep., 2d Series, 775; and *Gesellschaft Fur Drahtlose Telegraphie M. B. H.* v. *Brown*, 78 Fed. Rep., 2d Series, 410.

As to the *second question* presented by the petitioner, we are unable to see that the decisions of the Supreme Court of Virginia have any bearing on the case, because it was the contention of the petitioner in the lower court that some form of contingent fee agreement was made with him by the Vice-President of the defendant in the City of New York. The work to be done by the petitioner was to be done in the City of Washington and the defendant is a non-resident corporation controlling the Washington Airport by stock ownership. If we assume, however, that the Virginia decisions have any bearing on the case, it is difficult to understand how counsel for the petitioner can get any comfort from that.

In the case of *Old Dominion Transportation Co.* v. *Hamilton*, 146 Va. 549, the Virginia Court in no way departed from the decisions rendered by the Supreme Court of the United States. This case was brought to the Supreme Court of Appeals of Virginia on account of the refusal of the lower court to grant an instruction reading as follows:

"The court instructs the jury that neither personal nor political influence is a vendible article in our system of law and morals, and if you believe from the evidence that the plaintiff used his personal and political influence to secure from the officers of the city of New York the use of pier 26 for the defendant or to secure a lower rental of pier 31 for the defendant than could have been secured by an ordinary business man without any special personal or political influence, then the courts of this Commonwealth will not assist him in securing compensation for such services and your verdict should be for the defendant."

On page 615 the court said regarding this instruction:

"The instruction tendered was too unqualified a statement of the law to be warranted by the evidence. It should have been modified by a statement of the character of the influences personal and political which would vitiate a contract or a recovery upon a *quantum meruit*, and so modified it should have been given. It should have told the jury that the contract in evidence is not against public policy nor illegal on its face, and that the burden of showing it to be against public policy or illegal was upon the defendant *unless either of these infirmities appear from the plaintiff's own testimony.*" (Italics mine.) "When the defendant had shown this by a preponderance of the evidence, the plaintiff could not recover. It should further have told the jury that if it believed from the evidence that either personal or political influence were brought to bear, and that the city authorities were asked to decide the controversy in favor of the transportation company for personal or political reasons, there could be no recovery.

"On the other hand, even if the jury believed from the evidence that either personal or political influence was exerted by the plaintiff, but merely to secure a hearing from the city authorities, and an opportunity to present the matter in issue upon its merits, and that when such opportunity was secured the case was presented upon its merits and upon its merits alone, then

in that event the jury should have been told that the plaintiff was entitled to a judgment."

In the case of *County of Campbell* v. *Howard*, 133 Va. 19, at page 62, the court in its opinion states in part:

> "The authorities very generally hold that a contract to pay for services to be performed in the endeavor to obtain or defeat legislation by other means than the use of argument addressed to the reason of the legislators, such as, for example, for the exertion of personal or political influence apart from the appeal to reason as applied to the consideration of the merits or demerits of the legislation in question, is an illegal contract," (citing *Trist* v. *Child*, 21 Wall. 441, and numerous other cases.)
>
> "As, however, as aforesaid, the contract in the case in judgment was merely for services consisting of the presentation of argument addressed to the reason of the legislators, the present case does not fall within such holding."

In the case of *Camp* v. *Bruce*, 96 Va. 524, the Supreme Court of Appeals of that State used this language as to the enforcement of illegal contracts:

> "If it be an illegal contract, as claimed in argument, this suit cannot be maintained, although that defense was not raised by the pleadings, nor relied upon in the Circuit Court. The law refuses to enforce illegal contracts, as a rule, not out of regard for the party objecting, nor from any wish to protect his interests, but from reasons of public policy. Whenever, therefore, the illegality of the contract appears, whether alleged in the pleadings or made known for the first time in the evidence, it is fatal to the case. That defect cannot be gotten rid of either by failure to plead it, or by agreeing to waive it in the most solemn manner. The law will not enforce contracts founded in its violation."

It should, of course, be noted, that the only two officers of the defendant with whom the plaintiff petitioner had any

contact were F. F. Russell in New York and S. J. Solomon in the District of Columbia, both of whom stated positively that they had no understanding or no knowledge of any agreement with the plaintiff other than the compensation of $500 per month to be paid him while he was employed by them. (Testimony of F. F. Russell, Transcript of Record p. 54; testimony of S. J. Solomon, Transcript of Record pp. 55-56-57.)

Conclusion

In conclusion, it is respectfully submitted that if there ever were a case where a lobbying contract is thoroughly established, it is the present case. Because of the fact that the information furnished to counsel for defendant by his witnesses and testfied to by them (Transcript of Record, pp. 54-55-56-57) to the effect that only one agreement had been made with the plaintiff, namely, to pay him $500 per month for such time as he was employed by the defendant, with the right on behalf of said defendant to terminate the plaintiff's services at the end of any month, no plea was filed on behalf of the defendant in its answer alleging lobbying. No plea having been filed alleged lobblying, the plaintiff testified throughout the trial in an endeavor to influence the jury as to the great amount of work which had been done for the defendant and the nature of the work done, and in so doing he clearly showed that he had done lobbying, for which, under the law, no recovery can be had. As soon as the testimony of the plaintiff developed the nature of the work done by him, counsel for the defendant made the usual motion for an instructed verdict and later moved the court to set the verdict aside and enter final judgment for the defendant, which motion the lower court sustained after exhaustive arguments and entered final judgment for the defendant.

The Circuit Court of Appeals for the Fourth Circuit unanimously affirmed the decision of the lower court, and we submit that the petition for certiorari should be refused.

Respectfully submitted,

NATIONAL AIRPORT CORPORATION,
Defendant.

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